No. 84-1667

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

BETHEL SCHOOL DISTRICT NO. 403, *et al.*,
Petitioners

v.

MATTHEW N. FRASER, A MINOR, and
E.L. FRASER, GUARDIAN AD LITEM,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE NATIONAL EDUCATION ASSOCIATION AS *AMICUS CURIAE*

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INTEREST OF THE *AMICUS CURIAE* *

NEA is a nationwide employee organization, with a current membership of over 1.6 million. The vast majority of NEA's members are educators in public schools, colleges, and universities. Among the purposes of NEA, as set forth in its charter, are "to . . . advance the interests of the profession of teaching and to promote the

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* The parties have consented to the filing of this brief, which is submitted in support of the respondents in this case.

cause of education in the United States." To this end, NEA frequently takes part in legal proceedings that bear on the rights of teachers and of students in the public schools.

Petitioners and various *amici* have filed briefs in this case purporting to represent the interests of the nation's educational community and arguing that the decision of the Court of Appeals will severely impair the ability of school officials to inculcate in students values of civility and decency. The teachers represented by NEA, however, are on the front line in enforcing school discipline, and, as this Court has recognized, are the ones who bear the greatest responsibility for "inculcating [in students] fundamental values necessary to the maintenance of a democratic political system. . . ." *Ambach v. Norwick*, 441 U.S. 68, 77-78 (1979).

For these reasons, NEA has a unique perspective on the issue presented in this case: whether suppression of student expression is necessary to further school officials' interest in inculcating in students values of decency and civility. To be sure, teachers need effective tools to maintain discipline and to instill such values, but at the same time they firmly believe that the education of students must be achieved first and foremost through skillful instruction and teacher example, consistent with constitutional values.

The interest of NEA, speaking for its members, is thus to provide the Court with the perspective of a major component of the nation's educational system, as it bears on this case. We believe that this perspective will assist the Court in reaching a reasonable accommodation between the needs of the schools to inculcate in students certain values on the one hand, and the rights of students to freedom of speech on the other.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents the issue whether, consistent with the First Amendment, public school officials can punish a high school student for giving a political nominating speech containing sexual innuendo in a voluntary student assembly.

This case does not involve a challenge to a school district's authority to determine curriculum content or to punish inappropriate comments expressed in a classroom setting. It does not involve discipline of a student for insubordination or for disrespectful language directed at a teacher, administrator, or other school official. Finally, this is not a case where a student was punished for engaging in disruptive conduct. Rather it is a "pure speech" case: Fraser was punished because of the words he used to express his opinion on an issue that he was concededly entitled to discuss.

In these circumstances, as we develop below, petitioners' disciplinary action cannot be sustained absent a demonstration that punishing Fraser was necessary to effectuate a substantial state interest. Petitioners assert two principal justifications for their action: that Fraser's speech created actual disruption on the school campus, and that, in any event, petitioners were entitled to punish Fraser on account of his speech in order to effectuate the school's interest in inculcating respect for decency and civility in public discourse.

We focus on the latter contention. We demonstrate herein that, in the unique circumstances of this case, petitioners' stated educational objective was implicated minimally, if at all, by Fraser's speech. We further show that petitioners had at their disposal means short of punishing Fraser at once fully suited to achieving their educational objective and compatible with the strictures and values of the First Amendment.

ARGUMENT

1. Although conceding that the First Amendment is applicable to expressive activities by students on public high school grounds, petitioners contend that school officials can punish students for what they say in a voluntary student assembly so long as they have a reasonable basis for doing so and are not motivated by a desire to suppress a particular viewpoint. (Pet. Br., at 17). This argument misstates the constitutional standard by which censorship of student expression on high school grounds must be judged. We demonstrate below that such a minimum standard is unsupported by this Court's decisions and misapplies traditional First Amendment analysis.

As a threshold matter, it is critical to recognize that Fraser's punishment "quite clearly rests upon the asserted offensiveness of the *words* [he] used to convey his message" to the student assembly. *Cohen* v. *California*, 403 U.S. 15, 18 (1971) (emphasis in original). "The only 'conduct' which the State sought to punish is the fact of communication[;] [t]hus, we deal here with [punishment] resting solely upon 'speech,' . . . not upon any separately identifiable conduct which allegedly was intended by [Fraser] to be perceived by others as expressive of particular views but which, on its face, does not necessarily convey any message and hence arguably could be regulated without effectively repressing [Fraser's] ability to express himself." *Ibid.*

The "usual rule" that governs such cases is that "governmental bodies may *not* prescribe the form or content of individual expression." *Id.*, at 24 (emphasis added). This rule, of course, is not absolute. But "most situations where the state has a justifiable interest in regulating speech will fall within one or more of . . . various established exceptions," not present here—namely, speech that is "obscene," speech that constitutes "fighting words," speech intended to "provok[e] a given group to hostile

reaction," or speech that intrudes "unwelcome views and ideas" into "the privacy of the home." *Id.*, at 20-21, 24; see, *e.g.*, *FCC* v. *Pacifica Foundation*, 438 U.S. 726, 744-45 (1978).

When the state seeks to regulate the content of speech outside these established exceptions it must be prepared to demonstrate a "particularized and compelling reason for its actions." *Cohen* v. *California*, 403 U.S., at 26. Put another way, the state must establish that the speech at issue clearly imperils substantial state interests.[1] *E.g.*, *FCC* v. *Pacifica Foundation*, 438 U.S., at 744-45; *Papish* v. *Board of Curators of the University of Missouri*, 410 U.S. 667, 670 (1973). As a logical corollary to this principle, this Court has made clear that restrictions on speech must be "no greater than is essential to the furtherance of [the state's] interest." *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968); See, *e.g.*, *Illinois State Board of Elections* v. *Socialist Workers Party*, 440 U.S. 173, 185 (1979). As this Court has explained:

> [E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of [governmental] abridgement must be viewed in the light of less drastic means for achieving the same basic purpose.

Shelton v. *Tucker*, 364 U.S. 479, 488 (1960). Thus, it is not enough that the state can demonstrate that direct regulation of speech would advance some legitimate state interest. For if this interest can be effectuated by alternative means, countenancing punishment of speech would *needlessly* sacrifice First Amendment values.

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[1] This Court has employed a variety of terms—"compelling," "substantial," "paramount"—to describe the nature of the government interest that must be shown. See *United States* v. *O'Brien*, 391 U.S. 367, 376-77 (1968), and cases cited therein.

2. These principles apply fully in the public school setting. As this Court has held, "[i]n the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views." *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U.S. 503, 511 (1969). "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Id.*, at 506. For "[f]reedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots." *Id.*, at 513.

Of course, First Amendment rights must be "applied in light of the special characteristics of the school environment," *id.*, at 506, because the state has special interests in that context. But this reality creates no justification for discarding the constitutional analysis applicable to the regulation of the content of speech generally, for that analysis is fully well suited to taking account of the special concerns arising in the public school context. While in this setting, the state's interests may vary, those interests, and the state's effort to effectuate them, may manageably be judged by the same standards used to evaluate actions by the state in its many other forms. If anything "'[t]he vigilant protection of [First Amendment] freedoms is nowhere *more* vital than in the community of American schools.'" *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967), *quoting Shelton v. Tucker*, 364 U.S. at 487 (emphasis added). "That they are educating the young for citizenship is reason for scrupulous protection of [First Amendment] freedoms of the individual if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 637 (1943)

3. Petitioners insist, nonetheless, that they need not demonstrate that their punishment of Fraser was necessary to effectuate a compelling state interest, but only that their actions "were reasonable in light of the surrounding circumstances." (Pet. Br., at 17). This is so, petitioners contend, because the school assembly was a "nonpublic forum," under this Court's decisions, notably *Cornelius* v. *NAACP Legal Def. & Educ. Fund, Inc.*, 105 S.Ct. 3439 (1985) and *Perry Educ. Assn.* v. *Perry Local Educators' Assn.*, 103 S.Ct. 948 (1983). Petitioners' contention is predicated upon a fundamental misunderstanding of this Court's decisions.

In *Cornelius* and *Perry*, this Court addressed the issue whether and in what circumstances speakers or issues could be excluded from a particular forum. As this Court explained, it "has adopted a forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes." *Cornelius* v. *NAACP Legal Def. & Educ. Fund*, 105 S.Ct., at 3448. Under this analysis, "[c]ontrol over *access* to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Id.*, at 3451 (emphasis added). These decisions mean no more nor less than that the government must be given latitude in permitting *access* to forums that the government has established for particular purposes. These decisions simply do not address what constitutional standard applies to the regulation of the *content* of speech delivered *within* the boundaries set for speakers and issues, whatever the nature of the forum.

This case poses no issue of *access* to a forum: Fraser was concededly welcome to speak at the student government assembly, and he spoke on the subject to which the assembly was dedicated. The issue in this case, as in

Cohen, is simply whether the state was justified in punishing Fraser on account of the words he selected to express his opinion on the issue he was concededly free to address. And in order to prevail on *this* issue, petitioners, as we have shown, must establish that their actions were necessary to effectuate a compelling state interest.

4. Petitioners, as an alternative argument, have attempted to meet this test on two principal grounds: by contending that Fraser's speech *actually* disrupted educational activities, and by contending that, in any event, punishing Fraser was necessary in order to effectuate the state's interest in inculcating values of decency and civility in public discourse. Petitioners' first contention must fail under a straightforward application of the material and substantial disruption standard articulated in this Court's decision in *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U.S., at 508-14. We focus our discussion on petitioners' more novel, second contention.

We begin by acknowledging that the state, through its public schools, has a substantial interest in "prepar[ing] individuals for participation as citizens, and in . . . preserv[ing] the values on which our society rests." *Ambach* v. *Norwick*, 441 U.S. at 76 (1979). This interest may extend, to a limited extent, to inculcating values of decency and civility in public discourse. Thus, the issue in this case is not whether petitioners' stated interest is a legitimate or substantial one, but whether petitioners were justified in seeking to promote this interest by punishing Fraser on account of his speech. Resolution of this issue requires a careful examination of the circumstances in which this speech was uttered in order to determine whether, under such circumstances, disciplining Fraser was the only means practicably available for effectuating the state's interest. As this Court has held, it is imperative to "consider [the] context" of

the speech in question "in order to determine whether the [state's] action" in regulating its content "was constitutionally permissible . . . ." *FCC* v. *Pacifica Foundation*, 438 U.S., at 747-49.

The circumstances in this case make clear that petitioners' stated interest was only minimally implicated, if at all, by Fraser's speech. As the Ninth Circuit observed:

> Although Fraser delivered his speech to a school-sponsored assembly, his speech was clearly not part of the school curriculum. The assembly, which was run by a student, was a voluntary activity in which students were invited to give their own speeches, not speeches prescribed by school authorities as part of the educational program. Attendance, moreover, was not compulsory; students were free to attend a study hall instead.

755 F. 2d, at 1364. Fraser's speech, therefore, did not impair the decorum of a classroom, defy curricular requirements, or imply official endorsement.[2] Attainment of petitioners' educational objectives hardly requires squelching every comment inconsistent with the state's teachings, no matter how tenuously such speech may impinge upon the state's goals.

Further, petitioners have available to them tried and true methods for inculcating the values they seek to promote—which, from all appearances, petitioners have made no effort to pursue—that are at once compatible with the First Amendment and the mission of the public schools. As this Court has observed, through "present [ation] and expl[anation] [of] subject matter in a way that is both comprehensible and inspiring," and through

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[2] Cf. *Widmar* v. *Vincent*, 454 U.S. 263, 271 n.10, 274 (1981) ("by creating a forum [a] [u]niversity does not thereby endorse or promote any of the particular ideas aired there," nor does it "confer any imprimatur of state approval"). Petitioner could have dispelled any appearance of endorsement by stating its position in whatever medium it uses to communicate its views to the student body or parents.

teacher "example," a public school may legitimately "influence the attitudes of students toward government, the political process, and a citizen's social responsibilities." *Ambach* v. *Norwich*, 441 U.S., at 78-79; cf. *West Virginia St. Bd. of Educ.* v. *Barnette*, 319 U.S. at 631, quoting *Minersville School Dist.* v. *Gobitis*, 310 U.S. 586, 604 (1940) (a state can "inspire patriotism and love of country" by requiring "*instruction* and *study* of all in our history and in the structure and organization of our government, including the guaranties of civil liberty," but the state is not free to inculcate these values by directly compelling students to proclaim their fidelity to this Country) (emphasis added).

Indeed, precisely because of the special characteristics of the school environment, petitioners are peculiarly well-situated to effectuate their inculcative goals without resorting to methods that directly stifle First Amendment freedoms. Petitioners have charge of public school students throughout the school day, day after day, week after week, year after year. And the greatest portion of this time is spent in the closely-supervised context of the classroom. During these hours, the state determines —as it can in no other setting—much of what the students must hear, and, to a significant degree, how they must hear it. In this way, petitioners enjoy the unique opportunity to shape and influence—profoundly—the views and values of the students under their charge.

What petitioners have been unable to achieve by virtue of this special position, through the proper exercise of this awesome authority, they could not hope to achieve by punishing Matt Fraser. It is inconceivable, in light of petitioners pervasive influence over public schoool students, that they could succeed in inculcating respect for decency and civility only by silencing this one student's speech arising in the unique circumstances described.

In sum, petitioners have failed to demonstrate that punishing Fraser was necessary to effectuate their legiti-

mate educational objectives. The state should not be free to select as its *preferred* means of inculcating the values that it seeks to promote those methods calculated to encroach most directly and broadly on First Amendment freedoms.

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit should be affirmed.

Respectfully submitted,

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